

84 - 638

NO.

FILED

OCT 23 1984

ALEXANDER L. STEVAS
CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1984

ROY L. PRICE,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

**HAILEY, McNAMARA, HALL,
LARMANN & PAPALE**

**RICHARD T. SIMMONS, JR.
3121 21st Street
Post Office Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 834-9252**

**Attorneys for Petitioner,
Roy L. Price**

5088



QUESTIONS PRESENTED

I. WHETHER THE FIFTH CIRCUIT COURT OF APPEAL'S APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE IN THE INSTANT CASE IS IN CONFLICT WITH THE JUDICIAL PROCEDURES OF OTHER CIRCUITS, SO AS TO REQUIRE SUPREME COURT REVIEW.

II. WHETHER, ASSUMING THE CONCURRENT SENTENCE DOCTRINE IS STILL VIABLE, THE SUPREME COURT SHOULD ESTABLISH OR REQUIRE THE APPELLATE COURTS TO ESTABLISH GUIDELINES TO INSURE THE PROPER APPLICATION OF THE DOCTRINE AND, IF SO:

A. WHAT GUIDELINES SHOULD BE APPLIED?

B. DID THE APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE, IN THE ABSENCE OF SUCH GUIDELINES, IMPEDE THE FULL CONSIDERATION OF THE EFFECT OF POSSIBLE INVALID CONVICTIONS UPON THE CONFIRMED CONVICTION.

III. WHETHER THE PETITIONER'S CONVICTION UNDER 18 U.S.C. §2113(b) IS OUTSIDE THE AMBIT OF THE STATUTE IN VIEW OF THE RULING IN *BELL V. UNITED STATES*, 103 S.Ct. 2396 (1983), NOTING THAT "SECTION 2113(b) DOES NOT APPLY TO A CASE OF FALSE PRETENSES IN WHICH THERE IS NOT A TAKING AND CARRYING AWAY."

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	4
Statement of Facts	5
Reasons for Granting the Petition	9
Conclusion	23
Relief Requested	25
Certificate of Service	26
Appendix "A"	A-1
Appendix "B"	A-13
Appendix "C"	A-15
Exhibit 1	A-18

TABLE OF AUTHORITIES

Case	Page
<i>Barnes v. United States</i> , 412 U.S. 837, 848; 93 S.Ct.2357, 2364 fn. 16 (1973).....	10
<i>Bell v. United States</i> , 103 S.Ct. 2396 (1983).....	20, 22, 23
<i>Benton v. Maryland</i> , 395 U.S. 784, 89 S.Ct. 2056 (1969).....	9, 10, 20
<i>Close v. United States</i> , 450 F.2d 152 (4th Cir. 1971), <i>cert. denied</i> , 405 U.S. 949 (1972).....	11
<i>Ethridge v. United States</i> , 494 F.2d 351 (6th Cir. 1974), <i>cert. denied</i> , 419 U.S. 1025 (1974).....	11
<i>Sibron v. New York</i> , 392 U.S. 40 (1968).....	9
<i>United States v. Brown</i> , 674 F.2d 436 (5th Cir. 1982).....	17
<i>United States v. Butera</i> , 677 F.2d 1376 (11th Cir. 1982).....	12
<i>United States v. Cardona</i> , 650 F.2d 54 (5th Cir. 1981).....	16
<i>United States v. Darnell</i> , 545 F.2d 595, 598 (8th Cir. 1976), <i>cert. den'd</i> , 429 U.S. 1104 (1976).....	18
<i>United States v. Davis</i> , 533 F.2d 921, 929 (5th Cir. 1976).....	17
<i>United States v. DeBright</i> , 730 F.2d 1255, 1256 (9th Cir. 1984) (<i>en banc</i>).....	12
<i>United States v. Evans</i> , 572 F.2d 455, 476-77 (5th Cir. 1978) <i>cert. den'd</i> , 439 U.S. 870 (1978).....	16
<i>United States v. Gower</i> , 503 F.2d 189 (D.C. Cir. 1974), <i>vacated on</i> <i>other grounds</i> , 413 U.S. 914 (1974).....	12
<i>United States v. Gray</i> , 626 F.2d 494, 502 (5th Cir. 1980).....	21

<i>United States v. Hernandez</i> , 662 F.2d 289, 291 (5th Cir. 1981)	16
<i>United States v. Hooper</i> , 432 F.2d 604 (D.C. Cir. 1970)	12
<i>United States v. Keller</i> , 512 F.2d 182 (3rd Cir. 1975)	11
<i>United States v. Montemayor</i> , 703 F.2d 109 (5th Cir. 1983)	12, 15
<i>United States v. Montoya</i> , 676 F.2d 428, 433 (10th Cir. 1982)	12
<i>United States v. Moynagh</i> , 566 F.2d 799 (1st Cir. 1977)	11
<i>United States v. Muller</i> , 550 F.2d 1375 (5th Cir. 1977)	11
<i>United States ex rel. Epton v. Nenna</i> , 449 F.2d 363 (2nd Cir. 1971), <i>cert. denied</i> , 404 U.S. 948 (1971)	11
<i>United States v. Pinkus</i> , 551 F.2d 115 (9th Cir. 1977)	11
<i>United States v. Rizzo</i> , 491 F.2d 1235 (2nd Cir. 1974)	22
<i>United States v. Tanner</i> , 471 F.2d 128 (7th Cir. 1972), <i>cert. denied</i> , 409 U.S. 949 (1972)	11
<i>United States v. Von Roeder</i> , 435 F.2d 1004 (10th Cir. 1971), <i>vacated on</i> <i>other grounds</i> , 404 U.S. 67 (1971)	12
<i>United States v. Warren</i> , 612 F.2d 887 (5th Cir. 1980) (<i>en banc</i>)	12, 14
<i>United States v. Williams</i> , 548 F.2d 228 (8th Cir. 1977)	11

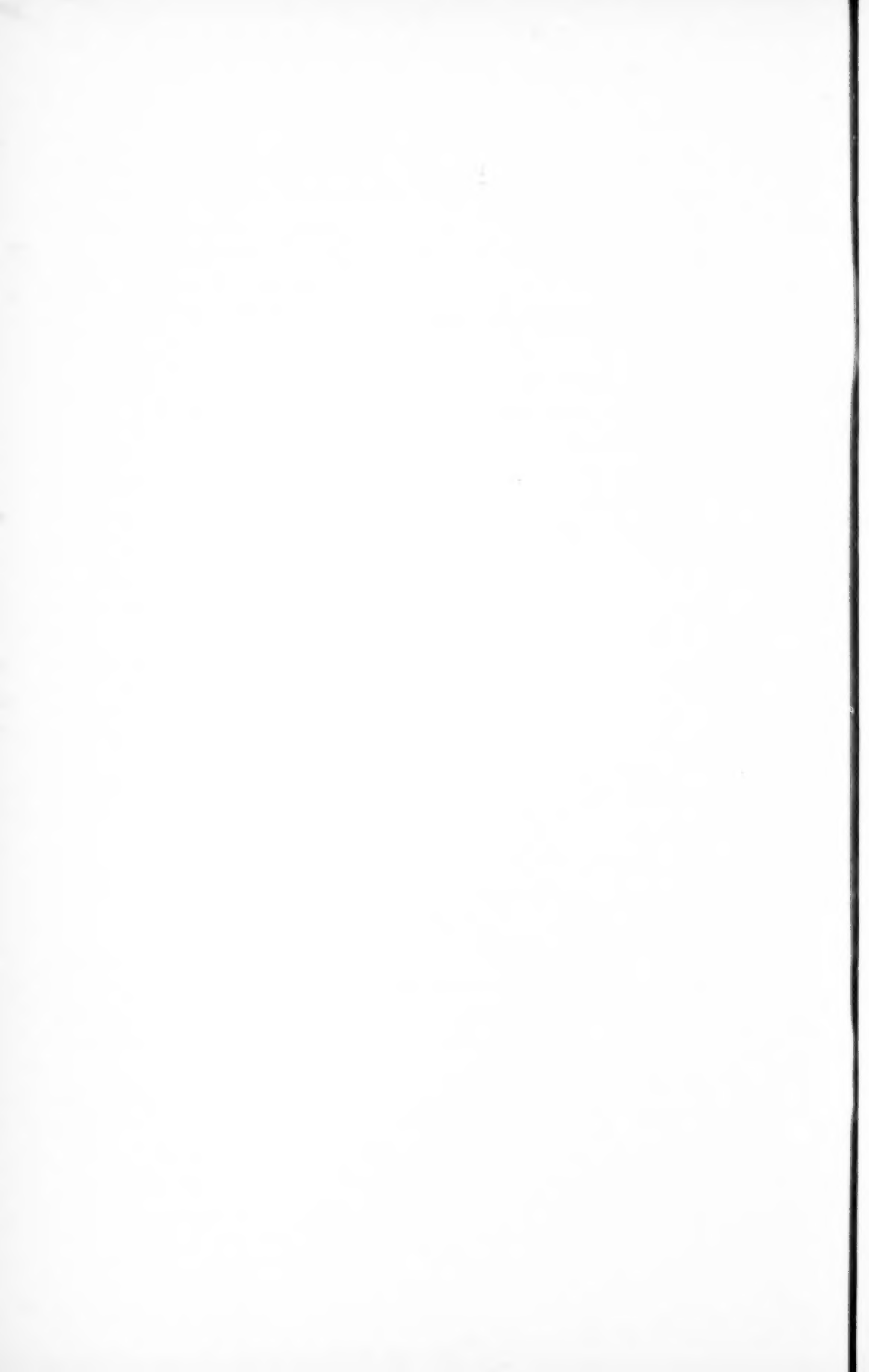
STATUTES

18 U.S.C. §371	2
18 U.S.C. §656	4
18 U.S.C. §1001	3

18 U.S.C. §1014	3
18 U.S.C. §2113(b)	3
28 U.S.C. §1291	4
28 U.S.C. §1254(1)	2

OTHER AUTHORITIES

Amendment V to the United States Constitution	2
<i>The Concurrent Sentence Doctrine After Benton v. Maryland</i> , 7 UCLA-Alaska L.Rev. 282 (1978)	10
<i>The Concurrent Sentence Doctrine: Sound Judicial Procedure or Illegitimate Shortcut?</i> 1981 U. Ill. L.Rev. 723 (1981)	10



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROY L. PRICE,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Roy L. Price, respectfully prays for a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit Court of Appeals entered its decision on August 7, 1984. A copy of the Court's opinion is attached as Appendix A. The suggestion of the petitioner for rehearing and rehearing *en banc* were denied by letter order dated September 10, 1984. A copy of the Court's letter order is attached as Appendix B.

STATEMENT OF JURISDICTION

The petitioner, Roy L. Price, was tried by federal jury and found guilty of violations of the general conspiracy statute, 18 U.S.C. §371 (Count I), false statements in violation of 18 U.S.C. §1014 (Count II) and §1001 (Count III), and bank larceny in violation of 18 U.S.C. §2113 (Count IV). The petitioner Price appealed his conviction, pursuant to 28 U.S.C. §1291, to the Court of Appeals for the Fifth Circuit. On August 7, 1984, the Fifth Circuit panel affirmed the conviction (Appendix A) and rehearing and rehearing *en banc* were denied on September 10, 1984 (Appendix B). The Fifth Circuit Court of Appeals stayed the issuance of the mandate pending petition for writ of certiorari. The instant petition has been filed within the sixty day time period allowed by law. Certiorari is sought under the authority of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

No person shall be...deprived of life, liberty, or property, without due process of law...

18 United States Code, §371, provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned for more than five years, or both....

18 United States Code, §1001, provides in pertinent part:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 United States Code, §1014, provides in pertinent part:

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of...any bank the deposits of which are insured by the Federal Deposit Insurance Corporation,...upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$5,000 or imprisoned not more than two years, or both.

18 United States Code, §2113, provides in pertinent part:

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to,

or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both;...

28 *United States Code*, §1291, provides in pertinent part:

The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court....

STATEMENT OF THE CASE

(1) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

On May 5, 1983, a Federal Grand Jury in the Eastern District of Louisiana indicted the petitioner, Roy L. Price, and his co-defendant, A. J. Graffagnino, in connection with the loans on a real estate development known as Oakland Estates (Record, volume #1, page #1; hereinafter "I, p. 1"). Graffagnino was also indicted in an unrelated case and entered into a plea bargain which called for his cooperation and possible testimony (I, p. 220). A Four Count Superseding Indictment was returned against petitioner, alleging the same offenses, except that Count IV was enhanced from a misapplication [18 U.S.C. §656] to a bank larceny [18 U.S.C. §2113(b)] (I, p. 179).

On August 19, 1983, the jury rendered verdicts of guilty as to all four counts (II, p. 232). On October 5, 1983,

the Court denied post trial motions and petitioner resigned his state judgeship in the 24th Judicial District Court prior to the sentencing (II, pp. 518-519). Petitioner was sentenced to eighteen months confinement on each count, to run concurrently (II, p. 524).

Petitioner filed his Notice of Appeal to the Fifth Circuit Court of Appeals on October 13, 1983. Briefs were filed and oral argument heard on June 14, 1984. On August 7, 1984, the Fifth Circuit panel opinion upheld petitioner's conviction on Count IV, and applied the concurrent sentence doctrine to Counts I, II and III, vacating the judgment on those counts. The petitioner suggested rehearing and rehearing *en banc* as to the application of that doctrine, including its possible effect on Count IV. On September 10, 1984, the rehearing and rehearing *en banc* were denied by letter order. The petitioner, Price, now petitions for Writ of Certiorari.

(2) STATEMENT OF FACTS

Background. The petitioner Price's only alleged co-conspirator, A. J. Graffagnino, was the major stockholder and the Chairman of the Board at the Commercial Bank & Trust (hereinafter "CB&T"). According to the 1977-1982 FDIC reports, Graffagnino had loans at the CB&T totalling over \$1.8 million (V, p. 17). The FDIC reports had also criticized many "insider loans" to the directors and officers of the bank, including president Beau Redmond.

Carruth Mortgage. The Oakland Estates' application to Carruth Mortgage for financing was made by Graffagnino and petitioner. Carruth Mortgage approved the project and was apparently unaware, as was petitioner, of Graffagnino's extensive loan indebtedness (VI, p. 158).

Because of Carruth's requirement of a \$100,000 Certificate of Deposit and the need for operating funds, additional funds were sought from the CB&T.

Commercial Bank & Trust. At the same time the mortgages were executed at Carruth, a \$300,000 Collateral Mortgage was obtained by CB&T in the name of Oakland Estates, but only \$200,000 was borrowed on April 28, 1978 (III, p. 25). Graffagnino indicated to petitioner that he did not want to sign the notes at the CB&T (VIII, p. 160). The \$100,000 CD required by Carruth Mortgage was financed by an individual loan by petitioner with his law office building as security.

The Redmond Meetings. The Government did not call Graffagnino to testify as to the alleged undisclosed interest but relied primarily on Redmond's recount of an initial meeting in April 1978. Redmond testified Graffagnino introduced him to petitioner, who outlined the project. Redmond asked who was to sign the note and was told that petitioner and the builder would sign (III, p. 20).

After the loans were secured, the project met with climbing interest rates and a decrease in housing demand. In May of 1979, petitioner again met with Redmond, who testified that petitioner stated, "Didn't you know that A. J. was involved in the loan?" Redmond further testified that petitioner appeared surprised that he was unaware of Graffagnino's interest (III, pp. 34; 50).

The March 1980 Refinancing. In March of 1980, petitioner wished to consolidate some loans at the National Bank of Commerce (hereinafter "NBCJ") (VIII, pp. 150-152). A 1970 Collateral Mortgage to NBCJ was in the amount of \$85,000, although the amount of the loan in

March of 1980 was only \$41,830. Petitioner had approximately \$30,000 in other loans at NBCJ, which he wished to consolidate. Although he could have obtained additional money by increasing the hand note to the amount of the Collateral Mortgage (\$85,000), he wished to obtain additional funds in order to make payments to CB&T (VIII, p. 204). Petitioner needed to borrow a total of \$100,000 with \$30,000 to go to the CB&T. The NBCJ wanted a first mortgage (VIII, p. 275).

Petitioner met with Graffagnino and indicated his desire to obtain refinancing of his building and further obtained a Trust Receipt for a Collateral Mortgage held by the CB&T. At the same time, petitioner signed a new Collateral Mortgage Note on the same property in the amount of \$150,000 (VIII, pp. 203; 208). Although his wife's name was not signed on this document, it could have been recorded. The testimony of a later bank president (Sneed) verified the existence of a replacement Collateral Mortgage Note (VII, p. 216).

Petitioner obtained the cancellation of the first (NBCJ) and second (CB&T) mortgage on his law building and refinanced a \$100,000 first mortgage with NBCJ. It was the intent of petitioner that the second mortgage by CB&T would be recorded after the NBCJ first mortgage. As a result of the \$100,000 loan at the NBCJ, \$69,700 went to pay off NBCJ loans of petitioner, while a \$30,300 check to petitioner was endorsed over to Commercial (CB&T) for payment on Price's loans (VIII, p. 26).

Truth in Lending Statement. In April of 1980, there was a renewal of the personal loan and petitioner was given a Truth in Lending form by the bank (VIII, p. 215). On that form, petitioner certified that he received a copy of that

form stating the applicable interest rates. Such documents are for the benefit of the customer and are required by the bank in order to demonstrate compliance with the Truth in Lending law (III, p. 74). However, the Government alleged that the bank's reference on the form to a \$100,000 Collateral Mortgage as securing the note was a "false statement" by petitioner (Count III) in that no such mortgage was in place after cancellation by petitioner.

May 1981 Renewal. In a letter dated May 7, 1981, Mr. Herbert, vice president of CB&T, invited petitioner to the bank to sign his personal loan and the Oakland Estates loans which were being consolidated "for convenience" (VIII, p. 216). No additional proceeds were advanced nor was there any submission to the Board. There was no testimony from Herbert or anyone else as to what occurred on May of 1981 during the renewal. Nevertheless, the Government contended in Count II that there was a concealment of Graffagnino's interest by the mere fact that there was a renewal.

Sale of the Causeway Law Building. In late of 1981, petitioner decided to seek election to a judicial position in Jefferson Parish. By that time, petitioner had placed an additional \$82,000 of his own money into the project (VIII, p. 42). In January of 1982, petitioner was elected to the 24th Judicial District bench and he had no further need for his law office building.

Upon receipt of a January 20, 1982, letter from Sneed, petitioner contacted Graffagnino. It was apparent that the new Collateral Mortgage had not been recorded (VIII, p. 221). During this time, petitioner was attempting to obtain Graffagnino's payment and also to sell his law office to pay off certain debts. Graffagnino promised to make

the appropriate payments and explicitly authorized the sale of the building (VIII, p. 270). In June of 1982, the property was sold, the only existing mortgage to the NBCJ being paid out of the proceeds.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT COURT OF APPEAL'S APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE IN THE INSTANT CASE IS IN CONFLICT WITH THE JUDICIAL PROCEDURES OF OTHER CIRCUITS, SO AS TO REQUIRE SUPREME COURT REVIEW.

Although the concept of the concurrent sentence doctrine has existed for some time, the first attempt to clarify the concept occurred in the case of *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969). Unfortunately, *Benton* failed to clarify much more than the precept that the concurrent sentence doctrine is not a jurisdictional bar to appellate review. *Id.*, at 793, 2061. The Court in *Benton* did not apply the concept, and cited its prior decision of *Sibron v. New York*, 392 U.S. 40 (1968), stating that adverse collateral consequences could prejudice a defendant in a concurrent sentence case.

The *Benton* Court stated, at 791, 2060:

"It may be that in certain circumstances, a federal appellate court, as a matter of discretion, might decide...that it is 'unnecessary' to consider all the allegations made by a particular party." The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however." (Citations omitted.)

Benton was cited in a footnote in the case of *Barnes v. United States*, 412 U.S. 837, 848; 93 S.Ct. 2357, 2364, fn. 16 (1973), when the Court declined to review four of six counts upon which concurrent sentences had been received. Although noting the concurrent sentences did not moot the issues raised, the concept was applied "as a matter of discretion." No statement of reasons were given. The lack of discussion of the concurrent sentence doctrine, in these and other subsequent Supreme Court cases, leaves the application and scope of the doctrine uncertain.

The doctrine has often been criticized and its application has varied among the various federal circuits. For example, one Law Review article commented that the doctrine was unconstitutional as a violation of the due process clause of the Fifth Amendment of the United States Constitution, because it infringes upon the inter-related rights of access to judicial review and a meaningful appeal. The article concluded:

"Maintenance of judicial procedures which operate at the expense of a denial of a measure of fundamental fairness to a party, such as the concurrent sentence doctrine, therefore, cannot be justified on the basis of the need for judicial economy. Continued use of the concurrent sentence doctrine cannot be justified as a sound procedure, but must be characterized as an illegitimate shortcut." *The Concurrent Sentence Doctrine: Sound Judicial Procedure or Illegitimate Shortcut?*, 1981 U. Ill. L.Rev. 723, 753 (1981).

Another Law Review article—*The Concurrent Sentence Doctrine After Benton v. Maryland*, 7 UCLA-Alaska L.Rev. 282 (1978)—surveyed the post-*Benton* application of the doctrine among the circuits as follows:

"The Fourth¹ and Seventh² Circuits reject the doctrine outright, while the Fifth³, Eighth⁴ and Ninth⁵ Circuits employ it quite frequently. *Id.*, at 306.

"The Second⁶ Circuit has interpreted *Benton* to permit the use of the doctrine as a discretionary matter, but has not exercised its discretion in such a manner as to indicate a strong preference for or against it. *Id.*, at 294.

"The Sixth⁷ Circuit has been very sensitive to the possibility of prejudice to the defendant resulting from affirming a concurrent sentence without review. *Id.*, at 293.

"The First⁸ and Third⁹ Circuits have refused to apply the doctrine in those cases where the problem arose. *Id.*, at 294.

¹ e.g., *Close v. United States*, 450 F.2d 152 (4th Cir. 1971), cert. denied, 405 U.S. 1068 (1972).

² e.g., *United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972), cert. denied, 409 U.S. 949 (1972).

³ e.g., *United States v. Muller*, 550 F.2d 1375 (5th Cir. 1977).

⁴ e.g., *United States v. Williams*, 548 F.2d 228 (8th Cir. 1977).

⁵ e.g., *United States v. Pinkus*, 551 F.2d 115 (9th Cir. 1977).

⁶ e.g., *United States ex rel Epton v. Nenna*, 449 F.2d 363 (2nd Cir. 1971), cert. denied, 404 U.S. 948 (1971).

⁷ e.g., *Ethridge v. United States*, 494 F.2d 351 (6th Cir. 1974), cert. denied, 419 U.S. 1025 (1974).

⁸ e.g., *United States v. Moynagh*, 566 F.2d 799 (1st Cir. 1977).

⁹ e.g., *United States v. Keller*, 512 F.2d 182 (3rd Cir. 1975).

"[The Tenth¹⁰ Circuit] has not devoted much in-depth discussion to the concurrent sentence doctrine... *Id.*, at 290.

"In the District of Columbia Court of Appeals¹¹ ...the concurrent sentence doctrine was applied, but instead of affirming an allegedly invalid concurrent count, the count was vacated. (citing *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970)." *Id.*, at 295.

Since this 1978 survey, the appellate opinions have merely added additional confusion and conflict. This year, the Ninth Circuit Court of Appeals, in an *en banc* decision, totally abandoned the concurrent sentence doctrine in all "future cases." *United States v. DeBright*, 730 F.2d 1255, 1256 (9th Cir. 1984) (*en banc*). In the Fifth Circuit, the dissenters in an *en banc* decision suggested guidelines be established for the application of the doctrine. *United States v. Warren*, 612 F.2d 887 (5th Cir. 1980) (*en banc*). More recently, the Fifth Circuit panel opinions adopt the procedures utilized by the D.C. Circuit in *Hooper*. See, *United States v. Montemayor*, 703 F.2d 109 (5th Cir. 1983) and other cases cited. The new Eleventh Circuit has adopted the procedures utilized by the Fifth Circuit and the D.C. Circuit. *United States v. Butera*, 677 F.2d 1376 (11th Cir. 1982). On the other hand, the Tenth Circuit has now rejected the vacation procedure of *Hooper*, stating that it has chosen not to follow "the D.C. and emerging Fifth Circuit practice." *United States v. Montoya*, 676 F.2d 428, 433 (10th Cir. 1982).

¹⁰ e.g., *United States v. Von Roeder*, 435 F.2d 1004 (10th Cir. 1971), *vacated on other grounds*, 404 U.S. 67 (1971).

¹¹ e.g., *United States v. Gower*, 503 F.2d 189 (D.C. Cir. 1974), *vacated on other grounds*, 413 U.S. 914 (1974).

In the instant case, the Fifth Circuit panel affirmed the conviction on Count IV and applied the concurrent sentence doctrine to the remaining three counts, which the petitioner contends were clearly reversible and had a "spill-over" effect upon the affirmed conviction. The panel opinion utilized the procedure of the *Hooper* case and vacated the convictions as to counts I, II and III. For reasons set forth below, petitioner would adopt the rationale set forth in the Ninth Circuit *en banc* opinion in *DeBright*.

The Ninth Circuit first concluded that the vacating procedure of *Hooper* was "a fundamentally erroneous practice." *DeBright*, at 1257. The Court stated that it was not an appropriate use of its supervisory authority and impermissibly infringed upon the prosecutorial function of the Executive Branch. Under *Hooper*, a judgment of conviction is vacated, but the jury verdict remains in tact. If there are changing circumstances that make the conviction significant, it would be subject to later appellate review. The Court in *DeBright* described this as an "unwieldy procedure...fraught with the potential for delay and the wasting of judicial resources." *DeBright*, at 1257.

Aside from the *Hooper* procedure, the Court in *DeBright* went on to reject the concurrent sentence doctrine itself based (1) on an inability to ascertain all the adverse consequences; and, (2) the defendant's statutory right (28 U.S.C. §1291) to have his or her conviction reviewed by the Court of Appeals. The Court, at 1259, concluded that "the advantages of reviewing each conviction on its merits substantially outweigh the threat and harm from any resulting decrease in judicial efficiency."

Accordingly, the petitioner urges the Court to resolve the conflict between the circuits in favor of the

position set forth in the above Ninth Circuit *en banc* opinion.

II. ASSUMING THE CONCURRENT SENTENCE DOCTRINE IS STILL VIABLE, THE SUPREME COURT SHOULD ESTABLISH OR REQUIRE THE APPELLATE COURTS TO ESTABLISH GUIDELINES TO INSURE THE PROPER APPLICATION OF THE DOCTRINE.

In the event the Court concludes that the concurrent sentence doctrine is a valid procedure in the name of judicial economy, it is respectfully requested that this Honorable Court establish or require the appellate courts to establish guidelines to insure the proper application of the doctrine. Presently, there is confusion, conflict and no clarity, as to the application of the doctrine. The adoption of guidelines as set forth below would allow for a consistent application of the doctrine among and within the various circuits.

In the case of *United States v. Warren, supra, en banc*, the Fifth Circuit granted a rehearing *en banc* in order to consider the policy factors bearing on the use of the concurrent sentence doctrine. The majority concluded that in view of certain rulings on the merits, that case was no longer a "vehicle for consideration of the policies underlying the concurrent sentence doctrine," at 889. To the contrary, the dissenters opined that:

"Absent guidance from the Supreme Court, the Fifth Circuit should establish definite guidelines for future application of the concurrent sentence doctrine. We respectfully dissent from its failure to do so in this case." At page 896.

The dissenting opinion went on to outline the guidelines suggested by the parties and discussed the consideration of adverse collateral consequences, noting the practice of the District of Columbia Court in vacating judgments of concurrent sentences.

Although there has been no full consideration of the doctrine, various panels of the Fifth Circuit have begun to utilize the procedure of vacating judgments of conviction with concurrent sentences in order to avoid "possible adverse consequences." *United States v. Montemayor*, *supra*.

Similarly, in the instant case, the panel has chosen to vacate the concurrent convictions in Counts I, II and III. The petitioner claims prejudice by the application of the concurrent sentence doctrine in two particulars. First, the doctrine has impeded full consideration of the effect of the possibly invalid convictions (Counts I, II and III) upon the upheld conviction in Count IV. Secondly, even if Count IV is to be upheld, the adoption of a procedure whereby Counts I, II and III are vacated when they are clearly invalid, nevertheless, produces adverse consequences.

The Suggested Guidelines.

The dissenting opinion in *Warren* noted the following suggested guidelines: (1) the concurrent sentence doctrine should not preclude review of clearly invalid convictions; (2) the doctrine should not apply if there is a reasonable possibility that evidence admitted on one conviction, and admissible only as to that conviction, affected the findings of guilt on the reviewed and affirmed conviction; (3) if the reviewed conviction was substantially effected by a legal issue raised in the concurrent appeal, the concurrent

sentence doctrine should not be applied; (4) if there is a reasonable possibility that the reviewed conviction will be reversed in subsequent proceedings, the concurrent sentence doctrine should not foreclose review of other convictions; (5) the concurrent sentence doctrine should not be applied if there is "any possibility" that the defendant will suffer adverse collateral consequences from the conviction; and (6) the concurrent sentence doctrine should not preclude the review of a conviction if there exists a reasonable possibility that the sentence on the reviewed affirmed conviction was enhanced because of the multiple convictions.

The petitioner urges the adoption of the six guidelines suggested above, with the following application to this case.

(1) The Concurrent Sentence Doctrine Should Not Preclude Review of Clearly Invalid Convictions. See, United States v. Evans, 572 F.2d 455, 476-77 (5th Cir. 1978) cert. den'd 439 U.S. 870 (1978)

The rationale for proceeding to review clearly invalid concurrent convictions was expressed in *United States v. Hernandez*, 662 F.2d 289, 291 (5th Cir. 1981). There, the Court ruled on the invalidity of two of the three Counts, stating:

"We do so fully cognizant of the course taken in applying the doctrine in *United States v. Cardona*, 650 F.2d 54 (5th Cir. 1981)...The pretermitted issues in *Cardona* would have entailed much more difficult analysis than those here. It strikes us that pretermittting such readily apparent findings would be judicially inconvenient, in the sense of leaving open a possible future appeal to

the Government, which we know at the present time is to be without merit."

Here, the petitioner contends that Counts I (18 U.S.C. §371), II (18 U.S.C. §1014) and III (18 U.S.C. §1001) are clearly invalid. As to the false statement (i.e., the omission of Graffagnino's interest) in Count II, the Government failed to present any evidence of such a false statement in the 1981 renewal and relied strictly upon the alleged omissions in the initial 1978 application. This is clearly not permissible under *United States v. Brown*, 674 F.2d 436 (5th Cir. 1982).

As to Count I, the only overt act alleged within the prescription period of the conspiracy was the omission of Graffagnino's interest as to the 1981 renewal mentioned above. Under *United States v. Davis*, 533 F.2d 921, 929 (5th Cir. 1976), the Government must, for purposes of the statute of limitations, both allege and *prove* an overt act within the prescription period. Accordingly, there was no proof of a 1981 omission and the petitioner's pre-trial motion for dismissal based on prescription should have been granted.

As to the false statement alleged in Count III, a reading of the Truth in Lending (TIL) form signed by the petitioner reveals that he made no statement on that form, other than to acknowledge receipt of the document. (See Exhibit 1.) The TIL form is a document which flows from the bank to the customer, not the other way around. Accordingly, the bank's reference on the form to a mortgage which had been cancelled was not the appellant's statement. NOTE: Appendix C contains a brief summary of the factual contentions as to Counts I, II and III.

Under guideline #1, an application of *Brown* and *Davis* clearly requires reversal of Counts I and II, while a simple reading of the TIL form serves to similarly reverse Count III.

(2) The Doctrine Should Not Apply if There is a Reasonable Possibility that Evidence Admitted on One Conviction, and Admissible Only as to That Conviction, Affected the Findings of Guilt on the Reviewed and Affirmed Conviction. (See, United States v. Darnell, 545 F.2d 595, 598 (8th Cir. 1976), cert. denied, 429 U.S. 1104 (1976))

In considering whether there is a "spill-over" affect as mentioned in *Darnell*, a distinction must be made between the respective counts and the evidence applicable to each. Counts I and II related to an "undisclosed interest" of a bank official in a \$200,000 Oakland Estates loan in 1978, while Counts III and IV relate to a 1980 "cancellation" of a \$100,000 mortgage as to the personal loan of Price. The "undisclosed interest" and the "cancellation of the mortgage" are two separate aspects of the case.

It is in the area of "undisclosed interest" that the Government offered direct testimony contradictory to that of the petitioner. As noted in the panel opinion, it was the key to the petitioner's defense on Count IV that there was a substitution note executed at the time of the cancellation. The Government presented no direct testimony to refute evidence of a "substitution note" (e.g., Graffagnino did not testify). Nevertheless, in the closing argument quoted in the panel opinion, the Government was able to belittle the petitioner's defense in this area because of the direct credibility contest on the issue of "undisclosed interest."

In view of the fact that the Government's impeachment on the undisclosed interest rests with the testimony of Redmond and other directors, it was critical that these witnesses be cross-examined as to their own exposure as a result of FDIC violations.

In applying the concurrent sentence doctrine and vacating the petitioner's convictions on I and II, the panel opinion does not consider the inter-relationship between the undisclosed interest (Counts I and II) and the mortgage cancellation (Counts III and IV). Thus, the application of the concurrent sentence doctrine impedes the full consideration of the affirmed count.

(3) If the Reviewed Conviction was Substantially Effected by a Legal Issue Raised in the Concurrent Appeal, the Concurrent Sentence Doctrine Should Not be Applied.

The legal issue of prescription was raised by motion for a dismissal of Count I. As to Counts I and II, the Government used the "boot strap" argument: "Count I has not prescribed because Overt Act IV (the May 1981 renewal) is an overt act within the prescription period, but the proof of that act (Count II) is found in the initial 'failure to disclose' of 1978 which is prescribed." The granting of the motion would have prohibited the Government from benefiting from such an argument in the form of impeaching testimony of Redmond as to the initial 1978 meeting with Price. Thus, the failure to grant the motion substantially affected the validity of the reviewed conviction.

(4) If There is a Reasonable Possibility that the Reviewed Conviction will be Reversed in Subsequent Proceeding, the Concurrent Sentence Doctrine Should Not Foreclose the Review of Other Convictions. Benton v. Maryland, 395 U.S. 784, 792-93 (1969).

Later, the petitioner raises the issue of the application of *Bell v. United States*, — U.S. —, 103 S.Ct. 2398 (1983), to Count IV. For reasons set forth in Issue III, there is a reasonable possibility that the reviewed conviction may be reversed during further appeal to this Court. Accordingly, the panel opinion should have reviewed all counts.

(5) The Concurrent Sentence Doctrine Should Not Apply if There is "Any Possibility" That the Defendant will Suffer Adverse Consequences from the Conviction.

In the *Warren* decision, the dissent listed various subject matters which may constitute adverse collateral consequences from a conviction: parole, impeachment, enhancement of sentence in future conviction, stigma, deportation and forfeiture (including forfeiture of employment opportunities).

In the instant case, the petitioner faces disbarment proceedings before the Louisiana Supreme Court, based on jury convictions on all four counts. Although the panel opinion "vacates" the convictions on Counts I, II and III, the opinion, by footnote 6, states that the Government may later make objections and thereby cause these convictions to be subject to appellate review. Thus, what the petitioner contends are clearly invalid convictions have been left in limbo, subject to some later whim of the Government that sentences can be reimposed.

Although any felony conviction will suffice for serious consequences as to petitioner's license to practice, the deciding body should be informed of any opinion that the remaining counts of the Indictment are clearly invalid. The petitioner should enjoy whatever benefit might be derived from the invalidation of those counts in lessening the sanction from total disbarment.

(6) The Concurrent Sentence Doctrine Should Not Preclude Review of a Conviction if There Exists a Reasonable Possibility that the Sentence of the Reviewed and Affirmed Conviction was Enhanced Because of Multiple Convictions.

A "reasonable possibility" (as opposed to "mere possibility") that a sentencing judge might consider a challenged count in sentences for an unchallenged one, should be the standard for precluding the concurrent sentence doctrine. *United States v. Gray*, 626 F.2d 494, 502 (5th Cir. 1980). But, as *Gray* noted, "the burden of persuasion has not yet been set in concrete." The opinion points out the need for guidelines in the area.

The petitioner contends that there is a "reasonable possibility" that enhancement of sentence occurred as to Count IV, because of the convictions on Counts I and II. Although the 18 months sentence imposed as to Count IV, arguably, could not have been enhanced by a conviction on Count III, which was also related to the 1980 cancellation, the same cannot be said as to Counts I and II which related to the "undisclosed interest," dating back to 1978.

It is submitted that Counts I and II are separate from Counts III and IV. Thus, the Court should remand for resentencing as to Count IV, if Counts I and II are invalid.

See, *United States v. Rizzo*, 491 F.2d 1235 (2nd Cir. 1974) (conspiracy count reversed and case remanded for reconsideration of sentencing on the substantive count).

Even if this Court approves of the concurrent sentence doctrine (and adopts the *Hooper* procedures), the application of the doctrine must be subject to certain guidelines, as suggested, to avoid any prejudice with regard to review of convictions on the merits and impact as to sentencing. As to this issue, the instant case presents the "vehicle" whereby the Court may address the concurrent sentence doctrine and the division in the circuits as to its application.

III. THE PETITIONER'S CONVICTION UNDER 18 U.S.C. §2113(b) IS OUTSIDE THE AMBIT OF THE STATUTE IN VIEW OF THE RULING IN *BELL V. UNITED STATES*, 103 S.Ct. 2396 (1983), NOTING THAT "SECTION 2113(b) DOES NOT APPLY TO A CASE OF FALSE PRETENSES IN WHICH THERE IS NOT A TAKING AND CARRYING AWAY.

Although the trial court later upheld Count IV (bank larceny), it was very troubled by the Government's theory of the case. During the post-trial motions, the trial court stated:

"I understand the transaction. I understand that that might constitute some other offense in dealing with the bank. *My problem is whether or not that constitutes the offense that you have charged—stealing, bank larceny...* It may be that he did or he misrepresented something to the bank in order to obtain the security. That's not what you've charged. You've charged him with having the intent to steal and purloin, willfully and intentionally carrying away \$100,000 of

monies, funds, credits to the bank. *Now that's what I don't understand.*" (VI, p. 12) (emphasis added)

In the instant case, there was no "taking and carrying away with intent to steal," in that the petitioner obtained the collateral mortgage note in exchange for a trust receipt, which made him, in effect, a trustee of the bank. Even under the Government's theory of the case, a "misapplication" or "embezzlement" is at issue.

In the recent case of *Bell v. United States*, __ U.S. __, 103 S.Ct. 2398 (1983), this Court affirmed the Fifth Circuit's divided *en banc* opinion in 678 F.2d 547 (5th Cir. 1982). This Court held that the bank larceny statute was not limited to common law larceny, but also proscribed a crime of obtaining money under false pretenses. Nevertheless, this Court did state that "2113(b) does not apply to a case of false pretenses in which there was not a taking and carrying away," at page 2401, and that "2113(b) may not cover the full range of theft offenses," at 2402. It is respectfully submitted that, even under the recent interpretation of *Bell*, the facts of this case are outside the ambit of 2113(b) and this Court should limit the application of the bank larceny statute by addressing the factual situation presented.

CONCLUSION

For reasons set forth above, the petitioner respectfully requests a Petition for Writ of Certiorari on the issues raised.

Respectfully submitted,

**HAILEY, McNAMARA, HALL,
LARMANN & PAPALE**

BY: _____
RICHARD T. SIMMONS, JR.
3121 21st Street
Post Office Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 834-9252

Attorneys for Petitioner,
Roy L. Price

RELIEF REQUESTED

WHEREFORE, the petitioner, Roy L. Price, moves this Court to grant a Writ of Certiorari in order to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

**HAILEY, McNAMARA, HALL,
LARMANN & PAPALE**

BY: _____
RICHARD T. SIMMONS, JR.
3121 21st Street
Post Office Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 834-9252

Attorneys for Petitioner,
Roy L. Price

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing have been served on the parties required to be served under Rule 28 of the Rules of the United States Supreme Court.

RICHARD T. SIMMONS

A-1

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3638

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY L. PRICE,

Defendant-appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

(August 7, 1984)

Before REAVLEY, JOHNSON and JOLLY, Circuit
Judges.

PER CURIAM:*

On July 7, 1983, a four-count indictment was returned against Roy L. Price. Count 1 charged Price with conspiracy to make and use false material statements and

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.. Pursuant to that Rule, the court has determined that this opinion should not be published."

representations to the Commercial Bank & Trust Company (CB&T) to obtain loans and loan extensions, in violation of 18 U.S.C. §371; Count 2, with making a materially false statement to CB&T for the purpose of renewing a loan, in violation of 18 U.S.C. § 1014 and § 2; Count 3, using a document containing a materially false, fictitious and fraudulent statement in connection with the disclosure of collateral to the FDIC, in violation of 18 U.S.C. § 1001; and Count 4, with taking and carrying away with intent to steal \$100,000 of the monies, funds and credits fo CB&T, in violation of 18 U.S.C. § 2113(b).

Following trial, the jury returned a verdict of guilty on each of the four counts. Following the denial of his motion for a new trial and for judgments of acquittal on each count, Price was sentenced to eighteen months' confinement on each count, with the sentences to run concurrently. Price appeals and raises numerous issues regarding the sufficiency of the evidence to support the convictions, improper restriction of cross-examination of government witnesses, improper exclusion of character testimony, improper rebuttal argument, and failure to give certain proposed jury instructions. We find the evidence sufficient to sustain Price's conviction on Count 4 and find no merit in his contentions regarding trial errors by the district court. We therefore affirm the conviction on Count 4, and, pursuant to the concurrent sentence doctrine, vacate the judgment of conviction on the other three counts.

I.

The charges against Price arise out of a series of transactions, beginning in 1978, between Price and CB&T. Price, then a practicing attorney, became involved in a real estate development project known as Oakland Estates. To

obtain collateral for this venture, Price and other principals in the project obtained a loan for \$300,000 from CB&T. At the same time, Price obtained a personal loan for \$100,000.¹ Actions taken by Price with respect to the instruments and security for this indebtedness form the basis for Count 4 of the indictment.

In Count 4 of the indictment, Price was charged with violating 18 U.S.C. § 2113(b)² by taking and carrying away from CB&T with intent to steal \$100,000 of the moneys, funds, and credit to CB&T, i.e., a \$100,000 collateral mortgage note. As noted above, he was found guilty of this count.

The events which led to this charge began on April 28, 1978, when Price borrowed \$100,000 from CB&T. As collateral security for the debt, Price and his wife executed a collateral mortgage note in the amount of \$100,000. To secure the collateral mortgage note, Price executed a collateral mortgage for the same amount.³ Collateral for the

¹ This \$100,000 loan was used to purchase a certificate of deposit which was deposited as additional security with the prime lender for the Oakland Estates project.

² Subsection 2113(b) provides in pertinent part:

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years or both....

18 U.S.C. § 2113(b) (Supp. 1982).

³ The collateral mortgage is a mortgage designed, not to directly secure an existing debt, but to secure a mortgage note pledged as collateral security for a debt or a succession of debts. Both the collateral mortgage note and the collateral mortgage which secures it are pledged to secure a debt. See *First Guaranty Bank v. Alford*, 366 So.2d 1299, 1301 (La. 1978).

loan was a second mortgage of Price's law office. The National Bank of Commerce in Jefferson held an \$85,000 first mortgage on this property. The property was appraised at \$175,000.

On March 7, 1980, Price took the collateral mortgage note out of the bank by executing a trust receipt. Printed upon the trust receipt was:

It is expressly agreed that the delivery of the withdrawn securities is being temporarily made to the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title to the withdrawn securities, and the undersigned is/are given possession thereof solely as trustee/trustees for said Bank, and as such to receive the avails thereof for said Bank.

It is further stipulated that the undersigned shall not, under any circumstances whatsoever, use, sell, or repledge the withdrawn securities, or any of them, withdrawn under the terms of this TRUST RECEIPT, nor use, sell or repledge the cash, stocks, bonds or other property, or any part thereof, received therefor, for any purpose than that of paying the indebtedness for the security of which the said withdrawn securities are pledged to said Bank.

At about this same time, Price was negotiating a \$100,000 loan with the National Bank of Commerce in Jefferson (NBC). As a condition of making the loan, NBC demanded a first mortgage in that amount on the loan office. Price acceded to the demand. NBC loaned Price \$100,000 on March 14, 1980, and Price cancelled CB&T's \$100,000 collateral mortgage note and NBC's \$85,000

collateral mortgage note.⁴ Once these mortgage notes were cancelled, NBC's \$100,000 collateral mortgage became the first and only mortgage on his law office. Price used the \$100,000 loan from NBC to pay off or consolidate loans at NBC which totalled approximately \$70,000, which included the balance of the \$85,000 collateral mortgage note. The remaining money, about \$30,000, was paid to CB&T but was not applied to the \$100,000 debt whose collateral had been cancelled. Thus, after this transaction, NBC had collateral on its \$100,000 loan which appraised at \$175,000; CB&T on the other hand, had no collateral on its \$100,000 loan, but had received \$30,000 to reduce other debts on which Price was liable.

After Price was convicted by a jury of violating subsection 2113(b) as charged in Count 4, he filed a motion for a judgment of acquittal. He contended that the evidence adduced at trial was insufficient to establish conduct in violation of that section. The district court found that two issues were presented by Price's motion: (1) whether there was a taking and carrying away, with intent to steal or purloin, the requisite property; and (2) whether the value of the property taken and carried away exceeded \$100. The district court found that the evidence was sufficient to establish both of these factors.

On appeal, Price contends that the evidence was insufficient to establish that there was a "taking and carrying away with intent to steal." Price argues that the trust receipt made him a trustee of the bank and that, as a trustee, he was allowed to surrender, sell or exchange the

⁴ Cancellation was accomplished by presenting the notes to Jefferson Parish's Recorder of Deeds. After the notes are cancelled, certificates are prepared which reflect the cancellation.

item withdrawn from the bank. He also points out that, as required by the trust receipt, he made payments to CB&T with part of the proceeds he obtained as a result of the cancellation of the CB&T collateral mortgage note.

In *United States v. Bell*, 678 F.2d 547 (5th Cir. 1982) (en banc), *aff'd*, *Bell v. United States*, __ U.S. __, 103 S.Ct. 2398 (1983), this court held that the language of subsection 2113(b) encompassed and proscribed the taking of the requisite property from a bank by *false pretenses*. It also reaffirmed this court's conclusion that the term "steal" as used in subsection 2113(b) embraced *all* felonious takings with intent to *deprive the owner of the rights and benefits of ownership*.

Bell, alas, tolls the bell for Price. In this case, evidence was presented which could have supported the jury in finding that Price obtained the mortgage note from the bank under the pretense that he would comply with the trust receipt which he executed and that it would be used in accordance with its terms. The jury surely could have found from the evidence that Price took the collateral mortgage note with the intention of cancelling it and thereby depriving CB&T of its security on a \$100,000 loan.

The trust receipt allowed Price to dispose of the collateral mortgage note but only upon the condition that the proceeds obtained therefrom would be used to pay the entire indebtedness. Instead of doing this, Price had the collateral mortgage note cancelled and did not apply the proceeds to satisfy the indebtedness. Before the collateral mortgage note was taken and cancelled, CB&T owned, through the note, security for a \$100,000 indebtedness. In cancelling the note, Price deprived CB&T of the rights and benefits of the note's ownership. If CB&T had executed on

the collateral at the time of its withdrawal, it would probably have realized full satisfaction of the \$100,000 indebtedness; once the collateral mortgage was withdrawn and cancelled, CB&T realized nothing on the indebtedness. As the district court found, Price's conduct in taking and depriving CB&T of its security for the indebtedness is properly characterized as "stealing" within the meaning of subsection 2113(b).

In conclusion, in deciding whether the evidence presented was sufficient to support a jury's guilty verdict, the evidence and the inferences which may be drawn therefrom must be viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). After doing so in this case, we conclude that the evidence was sufficient to establish that Price violated subsection 2113(b) by taking the CB&T collateral mortgage note, cancelling it, and then failing to use the proceeds derived from its cancellation to satisfy the \$100,000 indebtedness.

II.

Price attacks the government's closing argument, claiming that it prejudiced him and denied him a fair trial. During the trial, Price had testified that at the time of the cancellation of the original CB&T \$100,000 collateral mortgage note, an additional \$150,000 collateral mortgage and mortgage note were executed, albeit in incomplete form, and given to CB&T's chairman of the board. During closing argument, Price's attorney argued that the \$150,000 collateral mortgage and mortgage note were given in substitution for the cancelled mortgage note.

In rebuttal, the government's attorney pointed to

the absence of any reference to the existence of a \$150,000 mortgage in those financial documents and statements which Price prepared and executed subsequent to the date of the mortgage's alleged execution. The government's attorney then argued that the jury could reject Price's testimony regarding the \$150,000 mortgage saying: "Now where does this One Hundred Fifty Thousand Dollar mortgage that is presented to my office and a copy given to defense counsel two weeks ago come from? When was it made, all of that? Mr. Price says back in March of 1980. Come on." No objection was made at the time by defense counsel.

Price argues that the remarks amount to plain error. He contends that the government, in making the remarks, went beyond the record by arguing, in effect, that Price had engaged in obstruction of justice by "manufacturing" the mortgage documents. He also contends that the government was explaining, beyond the record, why it did not call CB&T's chairman to testify.

Price's testimony regarding the execution of an \$150,000 collateral mortgage and mortgage note to replace the cancelled mortgage note was a key part of his defense. It was therefore quite proper for the prosecution to comment on the credibility of Price's testimony about this mortgage note and its execution. Considering the remarks in context, they were proper comment on his testimony based upon the facts of this case. They constitute neither reversible nor plain error.

III.

During the trial, Price's attorneys were prepared to offer testimony from lawyers, bankers and persons in the

real estate business regarding Price's good general reputation for truth and veracity, honesty and integrity and as a law-abiding citizen. Counsel for the government informed Price's attorneys that if such testimony were elicited, they would cross-examine those witnesses regarding their knowledge of Price's alterations of bank documents in another banking transaction.

After reading the United States Attorney's file and grand jury transcripts and records concerning the investigation into the alteration of other bank documents, the district court told the parties that if character testimony were offered by Price, it would allow the government to inquire regarding the witnesses' knowledge of the altered bank documents. Accordingly, it denied the government's motion to limit the cross-examination in the area of character testimony. Price contends that the district court erred in doing so.

It is well settled that once a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to undermine the witness's credibility by asking that witness whether he has heard of prior misconduct on the part of the defendant inconsistent with the witness's direct testimony. *United States v. Wells*, 525 F.2d 974, 976 (5th Cir. 1976). A trial court's discretion in admitting inquiries as to a defendant's prior misconduct is subject to two limitations: (1) the prosecutor must have a good-faith factual basis for the incidents inquired about; and (2) the incidents inquired about must be relevant to the character traits testified about at trial. *Wells*, 525 F.2d at 977; *United States v. Franklin*, 471 F.2d 1299 (5th Cir. 1973).

In this particular case, it is apparent that the prosecution had a good-faith factual basis for an inquiry about altered bank documents. In addition, an inquiry about altered bank documents would have been relevant to the character trait (law-abiding citizen) about which Price's witnesses would have testified. If defense counsel opened the area of character testimony and put Price's reputation as a law-abiding citizen at issue, it would have been proper for government counsel to attempt to test the credibility of such character testimony through cross-examination concerning their familiarity with Price's alteration of bank documents. In conclusion, the district court did not abuse its discretion in refusing to limit the prosecutor's cross-examination of proposed defense character witnesses.

IV.

Price proposed that the district court instruct the jury in the following manner with regard to the elements of the offense charged in Count 4.

The elements of this offense are (1) that the defendant took and carried away monies, funds or credits of a value exceeding \$100.00, as set forth in the indictment; (2) that the defendant acted at the time with a specific intent to steal or purloin said monies or credits; (3)

With the exception of its deletion of the phrase "at the time," the district court gave the instruction as requested by Price. Price contends that the district court erred in failing to include this phrase in the instruction.

In *United States v. Harrelson*, 705 F.2d 733, 736-7 (5th Cir. 1983), we stated that a "trial judge is afforded

broad discretion in tailoring jury instructions and the failure to adopt a party's proposal will warrant reversal only where the charge considered as a whole does not correctly reflect the issues and the law." Applying that standard in this case, we conclude that the district court's failure to include the requested phrase in the instruction does not warrant reversal.⁵

V.

Price received sentences on Counts 1, 2 and 3 which are to run concurrently with the sentence imposed for his valid conviction on Count 4. We have often applied the concurrent sentence doctrine in similar circumstances. This doctrine gives an appellate court discretion to decline review of convictions in certain instances when a defendant is given concurrent sentences on two or more counts. The doctrine is not invoked to decline review of convictions if there is a significant likelihood that the defendant will suffer adverse collateral consequences through its application. To avoid the possibility of adverse consequences, this court has often chosen to vacate the unreviewed judgments of conviction. See *United States v. Montemayor*, 703 F.2d

⁵ Price contends that the district court erred in restricting the cross-examination of members of CB&T's board of directors and a bank examiner employed by the Federal Deposit Insurance Corporation (FDIC). Price wanted to cross-examine these witnesses about FDIC violations by the directors which had been cited in FDIC reports. He argues that such evidence would have reflected upon the directors' credibility as government witnesses. He also contends that it would be probative of the directors' probable knowledge of the undisclosed interest of CB&T's chairman in the loans which were the subjects of Counts 1 and 2 of the indictment. We have considered Price's argument and are not convinced that the district court committed reversible error. Furthermore, because we have vacated Price's convictions on Counts 1 and 2, this point bears no relevance to the outcome of our decision.

109, 116 (5th Cir. 1983); *United States v. Cardona*, 650 F.2d 54, 58 (5th Cir. 1981). We conclude that this approach is appropriate in this case. Accordingly, we vacate the judgments of conviction imposed on Counts 1, 2 and 3.⁶

AFFIRMED IN PART: VACATED IN PART.

⁶ Should the government subsequently determine that the interests of justice require that the sentences be reimposed, it may make objections and thereby cause these convictions to be subject to appellate review. *Cardona*, 650 F.2d at 58.

A-13

APPENDIX "B"

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 83-3638

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY L. PRICE,

Defendant-appellant.

**Appeal from the United States District Court for the
Eastern District of Louisiana**

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion 08/07/84, 5 Cir., 198 __, __ F.2d __)

(September 10, 1984)

Before REAVLEY, JOHNSON and JOLLY, Circuit
Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehear-

ing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX "C"

**BRIEF SUMMARY OF ARGUMENTS AS TO
INVALIDITY OF COUNTS, I, II AND III**

(NOTE: Although appellant does not incorporate by reference his initial brief, that brief is also filed with the instant Suggestion for *En Banc* in the event the Court would like additional information as to the factual issues involved. More specifically, Issues I, II, IV and V of the initial brief deal with these factual arguments.)

(Count II) The appellant was convicted on Count II of making a false statement (18 U.S.C. §1014) in connection with a May, 1981, renewal of a 1978 loan, by omitting the interest of a bank official in the loan. The Government presented no 1981 document containing an alleged false statement, nor did the Government present any evidence of an oral misrepresentations during the renewal. The Government relied strictly upon the alleged false statements ("omissions") in the initial 1978 application.

Under *United States v. Brown*, 674 F.2d 436 (5th Cir. 1982), a defendant does not implicitly incorporate initial false statements in a later loan in that §1014 denounces the making of a false statement, not the applying for a loan fraudulently (Even if there was a duty to disclose during the renewal, there was, in fact, an intervening disclosure in 1979 by the appellant to the president of the bank). There was ABSOLUTELY NO EVIDENCE of any statement, true or false, in connection with the 1981 renewal.

(Count I) In Count I, the appellant was charged with a conspiracy, dating from 1978 to 1982. Of the four overt

acts charged, three relate to the initial application which predated the five-year statute of limitation, and the fourth was the renewal in 1981 (identical to Count II). As noted above, there was no evidence submitted as to the renewal nor was there any evidence that the renewal was "in furtherance" of the alleged conspiracy.

In *United States v. Davis*, 533 F.2d 921, 0929, (5th Cir. 1976), the Court held that "for purposes of the statute of limitations, the overt act **alleged** in the indictment and **proven** at trial mark the duration of the conspiracy." Although Overt Act IV (the May, 1981, renewal) was alleged, it was not proved. Under *Davis*, the appellant's pre-trial and continuing motion for a dismissal of Count I (and II) based on prescription clearly should have been granted.

(Count III) The appellant was convicted in Count III of making a false representation on a Truth in Lending (TIL) disclosure statement (18 U.S.C. §1001). The Government contends that this TIL form references the existence of a \$100,000.00 collateral mortgage note, which had been cancelled. However, Price signed only two portions of this form—first, he acknowledged that credit life insurance was not required and, second, he acknowledged receipt of a copy of the form (see Appendix "A", paragraph 7 and 13). Both of these statements were true and no other statements were made by Price. The Government presented no testimony as to the actual signing of the document. This form is a standard document prepared by the financial institution to comply with the Federal Truth in Lending statute, which requires the bank's disclosure to the customer, not the other way around. Even the TIL criminal statutes are not applicable to the customer of the bank. Clearly, no statement as to the mortgage was made by the appellant on this form. [Appellant also contends that

there was no proof of materiality. *United States v. Beer*,
518 F.2d 168, 172 (5th Cir. 1975).]

(2)

No. 84-638

Office-Supreme Court, U.S.
FILED

JAN 25 1985

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Barnes v. United States</i> , 412 U.S. 837	5
<i>Bell v. United States</i> , No. 82-5119 (June 13, 1983)	4
<i>Benton v. Maryland</i> , 395 U.S. 784	5
<i>Hirabayashi v. United States</i> , 320 U.S. 81	5
<i>Lawn v. United States</i> , 355 U.S. 339	5
<i>Locke v. United States</i> , 11 U.S. (7 Cranch) 339	5
<i>United States v. DeBright</i> , 730 F.2d 1255	6
<i>United States v. Diaz</i> , 733 F.2d 371	6
<i>United States v. Gordon</i> , 634 F.2d 639	5
<i>United States v. Grunsfeld</i> , 558 F.2d 1231, cert. denied, 434 U.S. 872	5
<i>United States v. Hooper</i> , 432 F.2d 604	6
<i>United States v. Hopkins</i> , 716 F.2d 739	5
<i>United States v. Johnson</i> , 700 F.2d 699	5
<i>United States v. Lampley</i> , 573 F.2d 783	5
<i>United States v. Mullens</i> , 583 F.2d 134	5
<i>United States v. Peters</i> , 617 F.2d 503	5
<i>United States v. Romano</i> , 382 U.S. 136	5
<i>United States v. Smith</i> , 601 F.2d 972, cert. denied, 444 U.S. 879	5
<i>United States v. Tanner</i> , 471 F.2d 128	5

II

Page

Cases—Continued:

<i>United States v. Truong Dinh Hung,</i> 629 F.2d 908, cert. denied, 454 U.S. 1144	5
<i>United States v. Vargas,</i> 615 F.2d 952	5

Statutes:

18 U.S.C. 2	1
18 U.S.C. 371	1
18 U.S.C. 1001	1
18 U.S.C. 1014	1
18 U.S.C. 2113(b)	1, 3, 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-638

ROY L. PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the sufficiency of the evidence to support his conviction for bank larceny, in violation of 18 U.S.C. 2113(b).

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of conspiracy to make and use false material statements to obtain bank loans, in violation of 18 U.S.C. 371 (Count One); one count of making a materially false statement for the purpose of renewing a loan, in violation of 18 U.S.C. 1014 and 2 (Count Two); one count of making a false statement in connection with the disclosure of collateral to the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 1001 (Count Three); and one count of bank larceny, in violation of 18 U.S.C. 2113(b) (Count Four). He received concurrent sentences of 18 months' imprisonment on each of the four counts. The court of

appeals unanimously affirmed the conviction for bank larceny and vacated the judgments of conviction on the other three counts in accordance with its practice when not reviewing convictions involving concurrent sentences (Pet. App. A1-A12).

The evidence adduced at trial, as recounted in the court of appeals' opinion, established that petitioner, an attorney, became involved in a real estate development project in 1978. In order to acquire collateral for this venture, petitioner and other principals in the project obtained a loan in the amount of \$300,000 from the Commercial Bank & Trust Company (CB&T). At the same time, petitioner obtained a \$100,000 personal loan from CB&T. As security for the \$100,000 loan, petitioner and his wife executed a collateral mortgage note in that amount, and, to secure the note, a collateral mortgage. The property that petitioner mortgaged was his law office, on which the National Bank of Commerce in Jefferson already held an \$85,000 first mortgage. This property was appraised at \$175,000. Pet. App. A2-A4.

On March 7, 1980, petitioner removed the \$100,000 collateral mortgage note from CB&T by executing a trust receipt.¹ At that time, petitioner was negotiating to obtain a

¹Printed on the trust receipt was the following (Pet. App. A4):

It is expressly agreed that the delivery of the withdrawn securities is being temporarily made to the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title to the withdrawn securities, and the undersigned is/are given possession thereof solely as trustee/trustees for said Bank, and as such to receive the avails thereof for said Bank.

It is further stipulated that the undersigned shall not, under any circumstances whatsoever, use, sell, or repledge the withdrawn securities, or any of them, withdrawn under the terms of this TRUST RECEIPT, nor use, sell or repledge the cash, stocks, bonds or other property, or any part thereof, received therefor, for any purpose than that of paying the indebtedness for the security of which the said withdrawn securities are pledged to said Bank.

\$100,000 loan from the National Bank of Commerce in Jefferson (NBC). As a condition of making the loan the bank demanded a \$100,000 first mortgage on petitioner's law office. Petitioner agreed, and on March 14, 1980, NBC loaned him \$100,000. Petitioner cancelled CB&T's \$100,000 collateral mortgage note as well as NBC's prior \$85,000 collateral mortgage note, with the result that NBC's \$100,000 mortgage became the first and only mortgage on his law office. Pet. App. A4-A5.

Petitioner used the \$100,000 loan from NBC to pay off or consolidate loans at NBC totalling about \$70,000, including the balance on the original \$85,000 first mortgage on his law office. The remaining money, about \$30,000, was paid to CB&T, but was not applied to the \$100,000 loan. Thus, the loan remained outstanding, but, as a result of petitioner's cancellation of the mortgage, CB&T no longer held any collateral securing the loan. Pet. App. A5.

2. After he was convicted by the jury on the bank larceny charge, petitioner filed an unsuccessful motion for judgment of acquittal contending that the evidence was insufficient to establish a violation of 18 U.S.C. 2113(b) (Pet. App. A5).

The court of appeals affirmed the bank larceny conviction. It held that petitioner's taking and cancelling the \$100,000 mortgage note "is properly characterized as 'stealing' within the meaning of subsection 2113(b)" (Pet. App. A7). The court of appeals declined to review petitioner's other convictions because the sentences on those counts were concurrent with the sentence on the bank larceny conviction (*id.* at A11).

3. Petitioner claims (Pet. 22-23) that his conviction for bank larceny in violation of 18 U.S.C. 2113(b) is improper because his conduct did not involve the taking and carrying

away of property in the control of the bank.² This argument is meritless. This Court's decision in *Bell v. United States*, No. 82-5119 (June 13, 1983), confirms that Section 2113(b) applies to petitioner's conduct.

The Court held in *Bell* that 18 U.S.C. 2113(b) is not limited to the crime of common-law larceny, but also proscribes the crime of obtaining money under false pretenses (slip op. 5, 6). As the court of appeals found (Pet. App. A6-A7), the evidence in this case showed that petitioner obtained the mortgage note from the bank under the pretense that he would comply with terms of the trust receipt. The receipt authorized petitioner to dispose of the note only if he used the proceeds to pay his indebtedness to the bank (see note 1, *supra*). Petitioner cancelled the mortgage, but did not apply the proceeds to his debt. Thus, as the court of appeals stated, "[t]he jury surely could have found from the evidence that [petitioner] took the collateral mortgage note with the intention of cancelling it and thereby depriving CB&T of its security on a \$100,000 loan" (Pet. App. A6). Since petitioner took away a "thing of value" from the bank with "intent to steal," he properly was convicted of violating Section 2113(b).

4. Petitioner also contends (Pet. 9-22) that even though his convictions on the other counts were vacated, this case raises an issue involving the validity of the concurrent sentence doctrine. However, no question regarding the concurrent sentence doctrine is presented in this case.

²Section 2113(b) provides in pertinent part:

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years or both * * *.

The concurrent sentence doctrine, as it has been described by this Court, holds that when a defendant receives concurrent sentences for two convictions and one of the convictions is upheld, a court need not review the conviction on the other count because the conviction on one count is sufficient to sustain the sentence. *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943). See also *United States v. Romano*, 382 U.S. 136, 138 (1965); *Lawn v. United States*, 355 U.S. 339, 359 (1958); *Locke v. United States*, 11 U.S. (7 Cranch) 339, 344 (1813). The unreviewed conviction therefore is affirmed. See, e.g., *Barnes v. United States*, 412 U.S. 837, 848 n.16 (1973). This Court has indicated that affirmance of the unreviewed conviction may not be appropriate if the defendant would suffer adverse consequences as a result of the additional, unreviewed conviction. *Benton v. Maryland*, 395 U.S. 784, 790-792 (1969).³

³The courts of appeals generally have concluded that the concurrent sentence doctrine may be utilized if the defendant will not suffer adverse collateral consequences as a result of the affirmance of the unreviewed conviction. See *United States v. Gordon*, 634 F.2d 639, 643 (1st Cir. 1980); *United States v. Lampley*, 573 F.2d 783, 788 (3d Cir. 1978); *United States v. Truong Dinh Hung*, 629 F.2d 908, 931 (4th Cir. 1980) (Russell & Hall, JJ. concurring and dissenting), cert. denied, 454 U.S. 1144 (1982); *United States v. Mullens*, 583 F.2d 134, 142 (5th Cir. 1978); *United States v. Grunsfeld*, 558 F.2d 1231 (6th Cir.), cert. denied, 434 U.S. 872 (1977); *United States v. Smith*, 601 F.2d 972, 973 (8th Cir.), cert. denied, 444 U.S. 879 (1979); *United States v. Hopkins*, 716 F.2d 739, 749 (10th Cir. 1982); *United States v. Johnson*, 700 F.2d 699, 701 (11th Cir. 1983). The Second Circuit has placed the burden on the government to show the absence of adverse collateral consequences. *United States v. Vargas*, 615 F.2d 952, 960 (2d Cir. 1980). Under the Seventh Circuit rule, the absence of collateral consequences will be found only in rare situations. *United States v. Peters*, 617 F.2d 503, 506 (7th Cir. 1980); *United States v. Tanner*, 471 F.2d 128, 140 (7th Cir. 1972).

The Ninth Circuit, the District of Columbia Circuit, and some panels of the Fifth Circuit have refused to apply this rule to affirm convictions because of their view that the task of determining whether a defendant will suffer adverse consequences is too difficult and time consuming to

In this case, the court of appeals applied a variant of the concurrent sentence doctrine under which the unreviewed conviction is vacated, rather than affirmed, in order to "avoid the possibility of adverse consequences" (Pet. App. A11). This case therefore does not present any issue regarding the propriety of the affirmance of an unreviewed conviction under the concurrent sentence doctrine. Moreover, petitioner should not be heard to complain about a rule that provided him with essentially the same relief that he would have received if his challenges to these convictions had been successful on the merits.⁴

result in any gain in judicial efficiency. *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984); *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970); *United States v. Diaz*, 733 F.2d 371, 376 (5th Cir. 1984). The Ninth Circuit has held that the merits of a defendant's claim must be decided in every case; the District of Columbia Circuit and some panels in the Fifth Circuit have adopted the practice of vacating unreviewed convictions.

⁴Petitioner claims (Pet. 15) that he has been prejudiced because there was a "spillover effect" from the vacated convictions to his conviction under Section 2113(b). His only suggestion of such an effect is based on the claim (Pet. 18-19) that a portion of the government's closing argument used testimony relevant to Counts 1 and 2 to attack his defense on the other charges. However, the court of appeals specifically held that these comments provided no basis for a challenge to petitioner's conviction (Pet. App. A8). Petitioner also asserts (Pet. 20-21) that the jury convictions on all four counts may be used against him in disbarment proceedings. His speculation that a decision by the court of appeals addressing the merits of his claims might somehow result in a lesser penalty in the disbarment proceeding does not amount to prejudice, especially since the disciplinary body is likely to be aware of the effect of the vacation of the three convictions by the court of appeals.

Petitioner's argument (Pet. 16-17) that the concurrent sentence doctrine should not apply to clearly invalid convictions also fails to raise an issue warranting review by this Court. First, it seems likely that the court of appeals' decision to vacate the convictions constituted an implicit determination, wholly supported by the facts of this case, that the convictions were not clearly invalid. Second, even if the court below failed to follow prior Fifth Circuit decisions, the result at most is an intra-circuit conflict that does not merit review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985